**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| | : | **CASE NO. 18-gj-00041** |
| **IN RE: GRAND JURY** | : | |
| **SUBPOENA 7409** | : | **UNDER SEAL** |
| | : | |

**GOVERNMENT'S STATUS REPORT**

Pursuant to this Court's paperless Minute Order dated August 17, 2023, the United States of America, by and through the United States Attorney for the District of Columbia, respectfully submits copies of certain memorandum opinions and orders in this case, with redactions entered as recommended in the government's status report dated August 3, 2023.

Respectfully submitted,

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# Attachment A

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| *In re* GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-41 (BAH)<br>Chief Judge Beryl A. Howell<br>**FILED UNDER SEAL** |

## MEMORANDUM OPINION

A federal grand jury sitting in the District of Columbia has issued a subpoena to [redacted] to produce certain records in connection with an ongoing investigation conducted by the United States, through the Special Counsel's Office ("SCO"). Pending before the Court is [redacted] Motion to Quash Grand Jury Subpoena ("Mov.'s Mot."), ECF No. 3, on grounds that (1) [redacted] is immune, under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, from compliance with the subpoena, and (2) compliance would require [redacted] to violate foreign law, and thus be "unreasonable or oppressive" under Federal Rule of Criminal Procedure 17(c)(2). For the reasons explained in further detail below, neither argument persuades. [redacted] motion therefore is denied, and [redacted] is ordered to complete production of records responsive to the grand jury subpoena by October 1, 2018.

## I. BACKGROUND

The SCO is investigating foreign interference in the 2016 presidential election and potential collusion in those efforts by American citizens. The SCO has identified certain [redacted] as relevant to the investigation and, on July 11, 2018, the grand jury issued a subpoena to

[redacted] which is [redacted] to produce by, July 27, 2018, any such records held [redacted], in the United States or abroad. *See* Subpoena, ECF No. 3-1.[1]

On July 26, 2018, [redacted] through counsel, expressed to the SCO "concerns that pertain to the potential waiver of its sovereign immunity, as well as with respect to the reach of the subpoena beyond [redacted] Mov.'s Ltr., dated July 26, 2018 ("Mov.'s July 26 Ltr.") at 1, ECF No. 3-2. [redacted] counsel asserted that [redacted] is "an agency or instrumentality of [redacted] under the FSIA" as "a [redacted] by [Country A]," and therefore "is immune from the jurisdiction of U.S. courts as well as the reach of U.S. subpoenas." *Id.* at 1–2. "While [redacted] wishes to cooperate with the Special Counsel's investigation," [redacted] counsel wrote, "it cannot do so at the cost of potentially waiving or undermining its legal position with respect to the applicability of the FSIA and the protections that the FSIA affords [redacted] *Id.* at 2. [redacted] counsel also expressed doubt that any exception to the FSIA applied, noting specifically that the FSIA's exception for cases in which "the action is based upon a commercial activity carried on in the United States by [a] foreign state," 28 U.S.C. § 1605(a)(2), likely did not apply because [redacted] *Id.*[2]

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[1] [redacted]

[2] [redacted] counsel questioned whether this Court has personal jurisdiction over [redacted] *see* Mov.'s July 26 Ltr. at 2, to which the SCO responded that "[t]he subpoena was served on [redacted] not its New York branch," which "is not an independent entity." SCO's Ltr., dated July 30, 2018 at 2, ECF No. 3-3. The SCO argued that "[b]ecause the subpoena was served on [redacted] it is immaterial whether [redacted] has access to or visibility into documents in the possession of [redacted] as [redacted] itself "unquestionably does have such access and visibility." *Id.* (internal quotation marks omitted). The next letter [redacted] counsel sent the SCO made no reference to personal jurisdiction, *see* Mov.'s Ltr., dated Aug. 2, 2018, ECF No. 4-1, and [redacted] has not disputed this Court's personal jurisdiction over [redacted] in either subsequent correspondence with the SCO or its briefs supporting its motion to quash, thus waiving any objection on that ground. *See Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 344 (D.C. Cir. 2018) ("Unlike subject matter jurisdiction, personal jurisdiction is a personal defense that can be waived or forfeited" by "cho[osing] not to brief or argue the question of personal jurisdiction.").

In response, the SCO disagreed "with your suggestion that sovereign immunity or any other legal doctrine relieves your client from the obligation to produce the documents responsive to the subpoena in [redacted]s possession, custody, or control—wherever the documents are located." SCO's Ltr., dated July 30, 2018 ("SCO's July 30 Ltr.") at 1, ECF No. 3-3. The SCO asserted that the FSIA neither "applies in criminal cases [n]or divests the district court of power to enforce the subpoena," and that even if the FSIA applies, the FSIA's commercial activity exception would apply due to [redacted] "[redacted] activities in the United States." *Id.* at 1–2.

On August 2, 2018, [redacted] counsel sought from the SCO "written confirmation . . . that it is permissible . . . to share the grand jury subpoena with other personnel at [redacted] who would be involved in collecting the documents requested, including personnel at [redacted] in [City A] and at the [redacted] that may have responsive information." Mov.'s Ltr., dated Aug. 2, 2018 ("Mov.'s Aug. 2 Ltr.") at 1, ECF No. 4-1.[3] While reiterating [redacted] desire "to cooperate with the grand jury's investigation" and to find "a resolution that would provide the [SCO] with the documents requested," [redacted] emphasized its continuing "concerns on how its protections under the [FSIA] [redacted] could be impacted—or waived entirely—by producing documents responsive to the grand jury subpoena," as well as concern that compliance would violate "applicable law in [Country A] [redacted] *Id.* at 1–2.[4] As to the latter concern, [redacted] proposed that it produce responsive documents "consistent with, and as permitted by, the applicable laws of the jurisdictions in which the information may [be] located," subject to three conditions: the SCO's (1) agreement that [redacted] production "is not intended to be either an express or

[3] City A is Cairo, Egypt.
[4] Country B is the People's Republic of China.

implied waiver of [redacted] protections under the FSIA," (2) representation "that [the SCO] has a compelling need for the records requested," and (3) agreement "to a 30-day extension of the subpoena's return date, up to and including September 3, 2018, to give [redacted] adequate time to collect and process the [redacted]." *Id.* at 2.

The SCO responded the same day, informing [redacted] that the SCO "cannot agree to all of the representations made in your letter," but "offer[ing] the following assurances regarding your client's production of materials responsive to the subpoena." SCO's Ltr., dated Aug. 2, 2018 ("SCO's Aug. 2 Ltr.") at 1, ECF No. 4-2. The SCO "agree[d] that in the event the [FSIA] were deemed" to apply, [redacted] "production of documents responsive to the instant grand jury subpoena is not intended to constitute either an express or implied waiver of any protections [redacted] might be entitled to pursuant to the FSIA." *Id.* The SCO further represented that it had "a compelling need for records that are responsive to the grand jury subpoena," while maintaining nonetheless that the government need not "demonstrate such a compelling need in order to compel compliance with the subpoena." *Id.* Finally, the SCO agreed to extend the subpoena's return date by one week, to August 10, 2018. *Id.*

On August 6, 2018, [redacted] counsel communicated to the SCO his [redacted]

[redacted]

[redacted]," and that compliance with the subpoena thus "could constitute [redacted]," and requested that the SCO "share any thoughts your office has on this issue." *Id.* The SCO responded that "[w]e will take a look at this." SCO's Email, dated Aug. 7, 2018, ECF No. 4-3.

[redacted] counsel then shared "a little more color on the situation and what I've learned since" sending the prior email. Mov.'s Email, dated Aug. 7, 2018, ECF No. 4-3. Although [redacted] "has already begun pulling together the documents responsive to the subpoena," [redacted] counsel said, "before producing these to your office," [redacted] *Id.* At the same time, [redacted] counsel assured the SCO that [redacted] *Id.* Acknowledging that "we're not privy to the exact nature of your investigation and the specific need for [redacted] *Id.*

On August 14, 2018, the SCO responded that [redacted] *Id.* at 2. In an accompanying email, dated one day later, the SCO stated that "[w]e will extend the return date on the subpoena to [August 16, 2018], but do not anticipate granting any further extensions." SCO's Email, dated Aug. 15, 2018 ("SCO's Aug. 15 Email"), ECF No. 4-4.

In response to the SCO's letter, [redacted] counsel asked whether (1) the SCO would [redacted] Mov.'s Email, dated Aug. 14, 2018 ("Mov.'s Aug. 14 Email"), ECF No. 4-4. The SCO objected, cautioning [redacted]

[redacted] counsel subsequently "requested a further extension of the deadline for compliance with the subpoena until early September." Mov.'s Email, dated Aug. 15, 2018, ECF No. 4-4. The SCO denied this request, stating that (1) "[t]he subpoena was [redacted] over one month ago," (2) "[f]rom the very inception of our discussions about [redacted] concerns and how those concerns could be allayed, we have made clear to you that in light of our investigative exigencies we were not able to agree to a lengthy extension of the return date," (3) "[i]n an attempt to allow [redacted] to fully consider the issue, we nonetheless granted extensions of that deadline totaling almost 3 weeks," and (4) "we told you when we agreed to your last extension request that it would likely be our final grant of an extension." SCO's Email, dated Aug. 16, 2018, ECF No. 4-4.

On August 16, 2018, [redacted] filed a motion to quash the grand jury subpoena. *See* Mov.'s Mot.[5] The SCO's opposition, *see* SCO's Opp'n Mov.'s Mot. ("SCO's Opp'n"), ECF No. 4, was accompanied by a motion for leave to file an *ex parte*, *in camera* supplement, *see* SCO's Mot. Leave File *Ex Parte* Suppl. ("SCO's Mot. *Ex Parte* Suppl."), ECF No. 5, which the Court granted, *see* Order Granting SCO's Mot. *Ex Parte* Suppl., ECF No. 6. [redacted] filed a reply on August 31, 2018. *See* Mov.'s Reply SCO's Opp'n ("Mov.'s Reply"), ECF No. 8. Following a hearing on September 11, 2108, at which the SCO confirmed that the instant subpoena's issuance to an instrumentality of a foreign government was "approved in the normal matter . . . within the ranks of the Department of Justice," Hr'g Tr. (Sept. 11, 2018) at 39:16–23, ECF No. 16, and the

[5] [redacted] also filed a motion to seal case, *see* Mov.'s Mot. Seal Case, ECF No. 1, which the Court granted, *see* Order Granting Mov.'s Mot. Seal Case, ECF No. 2.

SCO's filing of two *ex parte*, *in camera* submissions, *see* Order Granting SCO's Mot. *Ex Parte* Suppl.; Minute Order, dated Sept. 14, 2018, [redacted] motion to quash now is ripe for review.

## II. LEGAL STANDARD

"On motion made promptly, the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c)(2). "[O]ne who relies on foreign law assumes the burden of showing that such law prevents compliance with the court's order." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987); *accord SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000). "Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source." FED. R. CRIM. P. 26.1.

## III. DISCUSSION

[redacted] seeks to quash the grand jury subpoena on grounds that (1) the FSIA grants [redacted] immunity from compliance with the subpoena and the jurisdiction of this Court to enforce the subpoena, and (2) compliance would be unreasonable or oppressive, as [redacted] would violate foreign law. As explained below, neither argument persuades.

### A. The FSIA Does Not Immunize [redacted] From Compliance With the Grand Jury Subpoena

[redacted] contends that as an agency or instrumentality of Country A, it "is immune from [the] jurisdiction of U.S. courts, as well as the reach of U.S. subpoenas." Mov.'s Mem. Supp. Mot. ("Mov.'s Mem.") at 4, ECF No. 3.[6] Foreign states and their agencies and instrumentalities

[6] [redacted]

generally are immune from the jurisdiction of American courts, but the FSIA recognizes an exception to immunity for certain actions relating to foreign states' commercial activities. 28 U.S.C. §§ 1603(a), 1604, 1605(a)(2). Assuming the FSIA's grant of immunity applies outside civil cases, the exceptions do as well. The SCO, through an *ex parte*, *in camera* submission, has demonstrated that the commercial activity exception applies here. The FSIA thus does not immunize [redacted] from compliance with the grand jury subpoena.

**1. Assuming the FSIA Applies Outside Civil Cases, the FSIA's Exceptions to Immunity Apply Outside Civil Cases As Well**

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to certain exceptions. 28 U.S.C. § 1604. The FSIA thus "renders a foreign government 'presumptively immune from the jurisdiction of United States courts unless one of the Act's express exceptions to sovereign immunity applies.'" *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017) (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 n.1 (2016)). [redacted] argues that these exceptions, set out in 28 U.S.C. §§ 1605–07, apply only to civil cases and, consequently, that the FSIA grants foreign states unqualified immunity outside the civil context. *See* Mov.'s Reply at 4. The SCO disputes that the FSIA applies outside the civil context, but contends that, if the statute applies here, the exceptions must apply as well. *See* SCO's Opp'n at 6–11. The Court assumes, without deciding, that the FSIA applies to grand jury investigative matters and concludes, contrary to [redacted] position, that the FSIA's exceptions to immunity, which are not by their plain terms limited to civil cases, apply outside the civil context as well.

The FSIA's commercial activity exception, for example, provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state

> elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). This language is not textually limited to civil matters. To the contrary, Section 1605(a)(2)'s unqualified language provides that the exception applies "in any case." *Id.*; *see SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) ("[T]the word 'any' naturally carries an expansive meaning.' . . . When used (as here) with a singular noun in affirmative contexts, the word 'any' ordinarily refers to a member of a particular group or class without distinction or limitation and in this way implies *every* member of the class or group." (quoting OXFORD ENGLISH DICTIONARY (3d ed. Mar. 2016) (alterations and internal quotation marks omitted))). The FSIA's other exceptions to immunity likewise apply "in any case" or "in any action" without any express limitation to civil matters. *See* 28 U.S.C. § 1605(a), (b) (enumerating six exceptions to sovereign immunity that apply "in any case"); *id.* § 1605(d) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage."); *id.* § 1607 (enumerating counterclaim-based exceptions to immunity that apply "[i]n any action").

Even though the FSIA's commercial activity exception is not facially limited to civil cases, [redacted] argues nonetheless that courts cannot exercise jurisdiction over non-plaintiff foreign states in non-civil matters because 28 U.S.C. §1330(a), the FSIA's jurisdictional statute, confers jurisdiction only over "civil action[s] against a foreign state." Mov.'s Reply at 4 (citing 28 U.S.C. § 1330(a)). Section 1330(a) does not facially purport to be the exclusive basis for exercising jurisdiction over a non-plaintiff foreign state, however.[7] Jurisdiction here is proper

[7] The general diversity jurisdiction statute confers jurisdiction, subject to a greater-than-$75,000 amount in controversy requirement, over civil actions between "a foreign state . . . as plaintiff and citizens of a State or of different States," 28 U.S.C. §1332(a)(4), but does not confer jurisdiction over actions against foreign states.

under 28 U.S.C. § 3231, as the grand jury is investigating "offenses against the laws of the United States." 28 U.S.C. § 3231.

[redacted] posits that jurisdiction can lie only under Section 1330(a), not under Section 3231, because "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). "[O]btaining jurisdiction over a foreign state" under the FSIA, *id.*, however, requires merely that one of the FSIA's substantive exceptions to immunity apply, not also, as [redacted] argues, that jurisdiction lie under Section 1330(a) itself. Indeed, *Amerada Hess* expressly recognizes that jurisdiction over a foreign state may lie under a statute other than Section 1330(a), so long as one of the FSIA's exceptions to immunity applies. *See id.* at 438–39 ("Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner."). The Supreme Court elsewhere has explained that "subject matter jurisdiction in any [action against a foreign state] depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). *Amerada Hess* thus best is read merely to reject a litigant's ability to make an end-run around the FSIA's substantive immunity provisions by invoking a separate jurisdictional statute, such as the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, as the plaintiff there attempted, *see* 488 U.S. at 432. A litigant who demonstrates that one of the FSIA's exceptions to immunity applies thus may rely on a jurisdictional statute other than Section 1330(a), such as Section 3231.

This reading of *Amerada Hess* best accords with the FSIA's language. Section 1604 provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States . . . *except* as provided in sections 1605 to 1607." 28 U.S.C. § 1604 (emphasis added).

This mandatory phrasing naturally implies that *if* an exception to immunity in Sections 1605 through 1607 applies, a foreign state *shall not* have immunity. Sections 1605 through 1607 do not distinguish between civil and non-civil matters. *See id.* §§ 1605–07. To conclude that a foreign state is entitled to immunity in a non-civil matter despite that an exception to immunity applies "as provided in sections 1605 to 1607," *id.* § 1604, does not square with Section 1604.

Language in another section of the statute supports this reading of the FSIA. Section 1602 instructs courts to resolve "[c]laims of foreign states to immunity . . . in conformity with the principles *set forth in this chapter*." *Id.* § 1602 (emphasis added). The FSIA's exceptions to immunity, *see id.* §§ 1605–07, and Section 1602 are located in the same chapter, *see id.* ch. 97, while Section 1330(a) is located in a separate chapter, *see id.* ch. 85. To conclude that a foreign state has immunity because an action falls outside Section 1330(a)'s scope, notwithstanding that an exception to immunity otherwise would apply, would be to resolve a claim of immunity "in conformity with" "principles" other than those "set forth in this chapter," *id.* § 1602, in violation of Section 1602.

Nor would allowing litigants to invoke a district court's jurisdiction over a foreign state by relying on statutes other than Section 1330(a) render Section 1330(a) superfluous, as Section 1330(a)'s enactment allowed district courts to hear actions over which jurisdiction otherwise did not exist. Section 1330(a) grants the district courts "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). At the time the FSIA was enacted, the general federal question jurisdiction statute, 28 U.S.C. § 1331, granted jurisdiction over "civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution,

laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1976), *amended by* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369.[8] Section 1330(a) thus allowed district courts to hear two categories of actions that Section 1331, as then written, did not. First, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of the amount in controversy. Second, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of whether the litigant had satisfied the well-pleaded complaint rule, which requires "that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Verlinden B.V.*, 461 U.S. at 494 (recognizing that the well-pleaded complaint rule does not apply to actions under Section 1330(a)).

Other specialized jurisdictional statutes in existence when the FSIA was enacted, such as the ATS, 28 U.S.C. § 1333 (admiralty, maritime, and prize), 28 U.S.C. § 1335 (interpleader), 28 U.S.C. § 1337 (commerce and antitrust), and 28 U.S.C. § 1338 (intellectual property), likewise did not grant the full scope of jurisdiction Section 1330(a) provides. *Cf. Amerada Hess*, 488 U.S. at 437 (observing that these jurisdictional statutes predated the FSIA). The FSIA's omission of any statute specifically conferring jurisdiction over non-civil matters against foreign states thus simply may reflect Congress's judgment that the existing scope of federal jurisdiction over non-civil actions against foreign states required no expansion.

For these reasons, the FSIA's exceptions to immunity are co-extensive with the FSIA's scope of potential immunity, such that if FSIA immunity extends outside the civil context, so too do the exceptions.

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[8] Section 1331(a)'s amount-in-controversy requirement did not apply to actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," 28 U.S.C. § 1331(a) (1976), but this exception rarely if ever would apply in an action against a foreign state.

**2. The Commercial Activities Exception**

The FSIA's commercial activities exception sets, out in three separate clauses, the circumstances under which a foreign state is not "immune from the jurisdiction of courts of the United States"—when "the action is based upon" (1) "a commercial activity carried on in the United States by the foreign state," (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "[C]ommercial activity" is "a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). An activity's "commercial character" is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than . . . to its purpose." *Id.* A foreign state's acts are "commercial" within the FSIA's meaning "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Moreover, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Id.* (internal quotation marks omitted).

As to the exception's first clause, "commercial activity carried on in the United States by a foreign state" is "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). "Thus, to invoke the district court's jurisdiction under clause one, the plaintiff's claim must be based upon some commercial activity by the foreign state that had substantial contact with the United States." *Odhiambo v. Republic of*

*Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014) (internal quotation marks omitted). As to the third clause, "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity," but such effect need not be "substantial" or "foreseeable." *Weltover, Inc.*, 504 U.S. at 618 (alteration and internal quotation marks omitted); *see also Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) ("A direct effect is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." (alterations and internal quotation marks omitted)).

The Supreme Court has explained that "an action is 'based upon' the particular conduct that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *see also Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) ("[A] court's jurisdiction under the Foreign Sovereign Immunities Act turns on the 'gravamen,' or 'essentials,' of the plaintiff's suit." (quoting *Sachs*, 136 S. Ct. at 395–97)).[9] "[T]he particular conduct that constitutes the 'gravamen,'" *Sachs*, 136 S. Ct. at 396, of an action to compel enforcement of or quash a grand jury subpoena most sensibly is said to be such conduct (1) that is part of "the general subject of the grand jury's investigation" and (2) as to which there exists a "reasonable possibility that the category of materials the Government seeks will produce information" that is "relevant." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991). This yields the following rule: a grand jury subpoena matter fits within the commercial activity exception if an activity or act of the kind Section 1605(a)(2) describes is part of the general subject of the grand jury's

[9] In *Nelson v. Saudi Arabia*, the Supreme Court said that "the phrase 'based upon,'" as used in Section 1605(a)(2), "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. 349, 357 (1993). The D.C. Circuit, relying on *Nelson*'s language, explained that "a claim is 'based upon' commercial activity if the activity establishes one of the elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Odhiambo*, 764 F.3d at 36. More recently, however, *Sachs* rejected a "one-element approach" to Section 1605(a)(2), holding that a court instead must "zero[] in on the core of [a plaintiff's] suit." 136 S. Ct. at 396.

investigation, and there exists a reasonable possibility that the category of materials the subpoena identifies will produce information relevant to such activity or act.[10]

**3. Analysis**

The SCO argues that the commercial activity exception applies here. SCO's Opp'n at 10. Through an *ex parte*, *in camera* submission, the SCO has elaborated on the relationship between [redacted] Section 1605(a)(2) activities or acts and the materials sought to be produced. Having thoroughly reviewed this *ex parte*, *in camera* submission, the Court is satisfied that the SCO has met its burden to show that (1) a Section 1605(a)(2) activity or act is part of the general subject of the grand jury's investigation and (2) a reasonable possibility exists that the instant subpoena will produce information relevant to such activity or act. *Cf. United States v. Nixon*, 418 U.S. 683, 700 (1974) ("Our conclusion is based on the record before us, much of which is under seal.").[11] The contents of the SCO's *ex parte*, *in camera* submission overcome any inference one otherwise might draw from [redacted] Mov.'s Mem. at 6 (parentheses omitted).

[redacted] argues that the commercial activity exception does not apply because the SCO "argues generically that the exception applies because [redacted]

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[10] The SCO argues that the relevant standard here is not *R. Enterprises, Inc.*'s standard to determine a grand jury subpoena's relevancy, but rather the standard to determine whether a court has personal jurisdiction to enforce a subpoena compelling production of [redacted] *See* SCO's Opp'n at 10–11. The commercial activity exception applies only where a Section 1605(a)(2) activity or act "constitutes the 'gravamen' of the suit," however. *Sachs*, 136 S. Ct. at 396 (2015). Although establishing personal jurisdiction over an entity is necessary to obtain relief in the sense that a court lacks authority to grant relief against an entity not within the court's personal jurisdiction, *see Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1779 (2017), personal jurisdiction alone cannot ordinarily be said to be the "gravamen" of a matter as *Sachs* uses that term, 136 S. Ct. at 396. A Section 1605(a)(2) activity or act thus may establish a court's personal jurisdiction over an entity without establishing a court's subject-matter jurisdiction under the FSIA.

[11] On September 14, 2018, the Court directed the government to submit an *ex parte*, *in camera* submission "addressing the following question: whether an act or activity of the kind described in 28 U.S.C. § 1605(a)(2) establishes a reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Minute Order, dated Sept. 14, 2018. On September 17, 2018, the SCO filed a submission responsive to the Court's order.

[redacted] without specifying any "jurisdictional nexus" between a Section 1605(a)(2) activity or act and the subpoenaed materials. Mov.'s Reply at 4. Obviously, [redacted] cannot address the contents of the SCO's *ex parte*, *in camera* submission, which persuades the Court that a nexus exists between [redacted] Section 1605(a)(2) activities or acts and the materials sought to be produced, and thus that the instant matter is "based upon" such activities or acts. The Court recognizes [redacted] difficult position in not being privy to the information reviewed and relied upon in resolving the pending motion. *See In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982) ("[A]ppellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case."). The law is well-settled, however, that courts may "use *in camera*, *ex parte* proceedings to determine the propriety of a grand jury subpoena" when "necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998); *see also In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006); *In re Grand Jury Investigation*, No. MC 17-2336 (BAH), 2017 WL 4898143, at *7 (D.D.C. Oct. 2, 2017). "The alternatives" to *ex parte*, *in camera* review here would "sacrific[e] the secrecy of the grand jury." *John Doe Corp.*, 675 F.2d at 490; *see also R. Enters.*, 498 U.S. at 299 ("Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand jury proceedings.'" (internal quotation marks omitted)).

For these reasons, the FSIA does not immunize [redacted] from complying with the subpoena.

**B. Compliance With the Subpoena Would Not Be Unreasonable or Oppressive**

[redacted] further argues that compliance with the grand jury subpoena would require violating [redacted], and thus be unreasonable and oppressive. [redacted] fails to show, however, that the subpoena and foreign law impose conflicting obligations and, in any event, the

grand jury's strong need for the materials sought [redacted] warrant the subpoena's enforcement notwithstanding any foreign prohibition on disclosure. Foreign law thus does not excuse [redacted] from complying with the subpoena.

**1. Compliance With the Instant Subpoena Would Not Violate Foreign Law**

[redacted] argues that complying with the subpoena would require violating Country A's Banking Law, Country A's Anti-Money Laundering Law ("AML Law"), and unspecified law in Country B. For the reasons that follow, [redacted] fails to show that the grand jury subpoena and foreign law impose conflicting legal obligations.

[redacted]

12 [redacted]

[redacted]

[redacted]

[redacted] cites no contrary authority co[redacted], relying instead on conclusory declarations by [redacted] own Country A in-house and retained counsel, which themselves cite no legal authority on this question of [redacted]. *See* Decl. of Ashraf Shaaban, Mov.'s Group Legal Counsel ("Shaaban Decl.") ¶ 7, ECF No. 3-6; Suppl. Decl. of Mona Zulficar ("Suppl. Zulficar Decl.") ¶ 4, ECF No. 12. The Court gives these declarations little weight. *See Doak v. Johnson*, 798 F.3d 1096, 1107 (D.C. Cir. 2015) (declining, in the summary judgment context, to credit "bare, conclusory statement[s] . . . in [a] declaration").

[redacted] *Id.* As an initial matter, the Court teased this argument from the declaration, as [redacted] failed to raise this argument in its briefs. This argument is therefore waived. *See Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1142 (D.C. Cir. 1999) ("We routinely and for good reason refuse to consider contentions not raised in a party's brief."). The argument fares no better on the merits, [redacted]

[redacted]

[redacted]

[redacted] identifies no contrary authority other than assertions by [redacted]

[redacted] neither of whom cite or analyze Country A legal authorities. The Court simply need not credit such conclusory opinions. *See Doak*, 798 F.3d at 1107. [redacted]

[redacted]

[redacted]

Finally, [redacted] argued at the September 11 hearing and via declarations of [redacted], though not through its briefs, [redacted] *See* Hr'g Tr. at 20:23–24:10. [redacted] has waived this argument in two ways. First, [redacted] failure to raise this argument in any briefs constitutes waiver. *See Berger*, 170 F.3d at 1142. Second, [redacted] are entirely conclusory, offering no substantive analysis and failing even to identify [redacted] *see also Doak*, 798 F.3d at 1107; *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (internal quotation marks omitted)).

For these reasons, compliance with the subpoena at issue would not require [redacted] to violate foreign law.

### 2. Enforcement of the Grand Jury Subpoena is Required Even If Disclosure Violates Foreign Law

Even if complying with the grand jury subpoena would require [redacted] to violate foreign law, the government's important interest in obtaining the materials sought [redacted] justify compelling compliance with this subpoena nonetheless. "[A]lthough courts recognize comity as an important objective, there is little doubt that a United States Court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary." *In re Sealed Case*, 832 F.2d 1268, 1283 (D.C. Cir. 1987) (alterations and internal quotation marks omitted); *see also In re Sealed Case*, 825 F.2d at 497–98 ("[A] court's ability to order a person to produce documents in contravention of foreign law [] is thought to be acceptable.").[13] In the grand jury context, courts regularly have concluded that government law enforcement interests outweigh [redacted] and subpoena recipients' interest in avoiding conflicting legal obligations. [redacted]

[13] *Braswell v. United States* held that a "custodian of corporate records" cannot "resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment," 487 U.S. 99, 100 (1988), abrogating that aspect of *In re Sealed Case* holding otherwise, *see* 832 F.2d at 1274–82; *see also In re Sealed Case (Gov't Records),* 950 F.2d 736, 739 n.5 (D.C. Cir. 1991) ("*Braswell* effectively rejects the portion of this court's opinion in *In re Sealed Case* . . . that recognizes a corporate custodian's right to resist a grand jury subpoena on the ground that the act of production itself might incriminate him."). *Braswell* did not purport to abrogate the aspect of *In re Sealed Case* recognizing district courts' power to enforce grand jury subpoenas compelling disclosure prohibited by foreign law, however, and *In re Sealed Case* remains good law in this respect.

(5th Cir. 1976) ("[T]his court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states."); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (expressing "great reluctance . . . to countenance any device that would place relevant information beyond the reach of this duly impaneled Grand Jury or impede or delay its proceedings," and requiring enforcement of a grand jury subpoena notwithstanding a foreign law prohibition).[14]

Section 442(1)(c) of the *Restatement (Third) of the Foreign Relations Law of the United States* directs that "[i]n deciding whether to issue an order directing production of information located abroad," a court "should take into account" (1) "the importance to the investigation . . . of the documents or other information requested," (2) "the degree of specificity of the request," (3) "whether the information originated in the United States," (4) "the availability of alternative means of securing the information," and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987). The Supreme Court, citing a draft version of Section 442(1)(c), identified these factors as "relevant to

14 [redacted]

any comity analysis." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).[15]

The subpoena at issue cannot be faulted for insufficient specificity, and the SCO does not argue that the information sought originated in the United States. The SCO's *ex parte*, *in camera* submission, meanwhile, persuades the Court that the materials sought are important to the grand jury's investigation and that failure to secure the materials would undermine important interests of the United States. [redacted] For these reasons, under the circumstances presented, the Court concludes that the subpoena should be enforced.

Section 442(2) of the *Restatement (Third)* further provides that "[i]f disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national," an American court "*may* require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available," and "*should not ordinarily* impose sanctions of contempt . . . on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a)." *Restatement (Third)* § 442(2)(a)–(b) (emphases added). As the emphasized terms indicate, however, these provisions are not absolute, and their

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[15] Additionally, several circuits have applied the Section 442(1)(c) factors in determining whether to require discovery on foreign soil. *See, e.g.*, *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474–76 (9th Cir. 1992); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1281–82 (7th Cir. 1990); *see also In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002) (applying Section 442(1)(c) in the context of a grand jury subpoena).

application may be inappropriate under particular circumstances. [redacted]

*In re Sealed Case*, which voiced "considerable discomfort" with the idea "that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question," 825 F.2d at 498, involved circumstances materially different than those presented here. The consideration that was "[m]ost important to [the *Sealed Case* panel's] decision [wa]s the fact that" contempt "sanctions represent[ed] an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory." *Id.* That consideration is absent here, as [redacted] only substantive arguments assert that compliance with the subpoena would require [redacted] *See* Mov.'s Mem. at 7–8. Moreover, in *Sealed Case* "the government concede[d] that it would be impossible for [redacted] to comply with the contempt order without violating the laws of Country Y on Country Y's soil." 825 F.2d at 498. Here, in contrast, the SCO asserts that compliance with the subpoena would not require [redacted] to violate foreign law, and the record before the Court supports this conclusion, for the reasons discussed above. [redacted]

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16 [redacted] that [redacted]

[redacted] As already discussed, [redacted]

The *Sealed Case* panel "emphasize[d] [] the limited nature of our holding on this issue," and explained that "[i]f any of the facts we rest on here were different, our holding could well be different." *Id.* Given the significant factual dissimilarity between that and the instant matter, enforcing the instant grand jury subpoena does not cause the "considerable discomfort," *id.* at 498, the *Sealed Case* panel expressed.

## IV. CONCLUSION

For the foregoing reasons, [redacted] Motion to Quash Grand Jury Subpoena is denied. [redacted] shall complete production of the subpoenaed records by October 1, 2018.

An appropriate Order accompanies this Memorandum Opinion.

**Date:** September 19, 2018

BERYL A. HOWELL
Chief Judge

# Attachment B

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| *In re* GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-41 (BAH)<br>Chief Judge Beryl A. Howell<br>**Filed Under Seal** |

**MEMORANDUM AND ORDER**

On January 8, 2019, the government requested that a status conference be scheduled, without identifying the specific issues requiring the Court's involvement. *See* Letter (Jan. 8, 2019), ECF No. 44; *see also* Min. Order (Jan. 9, 2019) (granting request). The next day, [redacted] filed a Combined Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [redacted] Property is Immune from Execution or Attachment and Motion for a Stay of this Court's Contempt Order Pending the Supreme Court's Disposition of [redacted] Petition for a Writ of Certiorari ("[redacted] Motion"), ECF No. 45.

At the status conference, held on January 10, 2019, the parties raised three issues: (1) [redacted] counsel's desire to make a public statement to clarify the identity of its client; (2) the briefing schedule for [redacted] Motion; and (3) the date that sanctions under the Court's October 5, 2018 Order, ECF No. 30, would begin accruing. Those three issues, as well as two other outstanding issues, are addressed in this Memorandum and Order.

### *1. Law Firm's Request to Make a Public Statement*

As many members of the media have speculated, and as the parties are plainly aware, this case arises from Special Counsel Robert Mueller's investigation into possible interference in the 2016 presidential election. Consequently, this case has attracted and continues to attract inordinate media attention. *See, e.g.*, Josh Gerstein & Darren Samuelsohn, *Mueller Link Seen in Mystery Grand Jury Appeal*, POLITICO (Oct. 24, 2018), https://www.politico.com/story/2018/10/24/mueller-investigation-grand-jury-roger-stone-friend-938572; Katelyn Polantz, *Mystery Mueller Mayhem at a Washington Court*, CNN (Dec. 15, 2018), https://www.cnn.com/2018/12/14/politics/mueller-grand-jury-mysterious-friday/index.html; Robert Barnes, Devlin Barrett, & Carol D. Leonnig, *Supreme Court Rules Against Mystery Corporation from 'Country A' Fighting Subpoena in Mueller Investigation*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-against-mystery-corporation-from-country-a-fighting-subpoena-in-mueller-investigation/2019/01/08/a39b61ac-0d1a-11e9-84fc-d58c33d6c8c7_story.html.

When the D.C. Circuit issued the abridged judgment affirming this Court's October 5, 2018 Order, the judgment disclosed that the subpoena recipient is a foreign-owned corporation. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018) (referring to the subpoena recipient as "a corporation … owned by Country A"). [redacted]

At the January 10, 2019 status conference, [redacted] counsel informed the Court that attorneys and employees at their law firm have received threatening messages. [redacted] asked for permission to make the following public statement [redacted]

The government objected to [redacted] request, arguing that any public comment [redacted]

After hearing the parties' arguments, the Court ordered that [redacted] counsel "[redacted], and may

not say anything other than that counsel represents the "foreign corporation that's referred to in [the D.C. Circuit's] opinion, [redacted] counsel requested a written order. *Id.* at 15:21–23. Thus, the parties were instructed, by January 11, 2019, to submit a joint status report proposing a written order. Min. Order (Jan. 10, 2019). Rather than submitting jointly, the parties submitted competing proposals. *See* Bank's 1st Proposed Order, ECF No. 51-1; Gov't's Proposed Order, ECF No. 53-1.

[redacted] initial proposed order would broadly preclude either party from making "any statement to the press other than 'No comment.'" *See* [redacted] 1st Proposed Order. Conversely, the government proposed that the Court make a finding of "a substantial likelihood that dissemination of the proposed disclosure would materially prejudice the due administration of justice and be adverse to [redacted] interests," and that the Court preclude [redacted] counsel "from making materially identical statements that confirm their representation of the subpoena recipient in this matter or describe the recipient." *See* Gov't's Proposed Order. Thereafter, on January 15, 2019, [redacted] supplemented its prior proposal, *see* [redacted] Supp. Proposed Order, ECF No. 55-1. The new proposed order would restrict [redacted] counsel from making any statement [redacted] but permit [redacted] counsel to confirm its representation of the subpoena recipient. *Id.* Although [redacted] counsel maintains that any limitation of its public statements violates the First Amendment, the supplemental proposed order, [redacted] counsel contends, does the least harm. *See* Supp. to [redacted] Status Report at 2–4, ECF No. 55.

Each party's initial proposal is too broad. For example, [redacted] proposal is limitless, omitting even any language that, at a minimum, would confine the Court's order to this case. At

the same time, the government's proposal would preclude [redacted] from publicly commenting on a fact that, for all intents and purposes, is already known: that [redacted] counsel represents the subpoena recipient in this case. Only [redacted] supplemental proposal matches the needs of this case. The Court's order must be limited so as to enforce only the limited measure of secrecy needed to ensure the fair administration of justice and the continuing requirement of grand jury secrecy. Therefore, as directed at the status conference, [redacted] counsel is ordered not to make any public statement or statement to the press that comments on the identity of the recipient of the grand jury subpoena in this case beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court.

*2. Briefing Schedule on [redacted] Motion*

The second issue raised at the January 10, 2019 status conference and addressed separately in the parties' post-conference submissions is the briefing schedule for [redacted] Motion, insofar as [redacted] seeks an order declaring the Court's October 5, 2018 Order unenforceable. While the Court promptly issued a briefing schedule, *see* Min. Order (Jan. 11, 2019), that order merits further explanation.

The parties were unable to reach an agreement about a schedule to govern briefing for [redacted] Motion. [redacted] noting that this matter has been litigated expeditiously at every other juncture and citing the unfairness of the government reserving, on the one hand, the right to request escalation of the contempt fines and, on the other hand, resisting an expedited briefing schedule, asked that the government be ordered to respond to [redacted] Motion by January 14, 2019, with [redacted] reply due January 16, 2019. *See* [redacted] Status Report at 1–2, ECF No. 51. The government, for its part, noting the need to consult with other government components

before submitting a response during a period of a partial government shutdown, asked to have until January 23, 2019 to respond to [redacted] Motion, in effect applying this Court's default rule that parties in criminal matters have 14 days to respond to a motion. *See* Gov't's Status Report at 2, ECF No. 53 (citing Local Criminal Rule 47(b)).

Neither party's proposed schedule was adopted; instead, the scheduling order provides the government until January 18, 2019 to respond to [redacted] Motion and [redacted] until January 22, 2019 to reply. *See* Min. Order (Jan. 11, 2019).

To date, the government has, as [redacted] underscores, pushed for prompt resolution of legal issues raised in this case, and the need for expeditious resolution of all contested legal issues arising from this grand jury remains pressing, not only because of the issues at stake but also [redacted]. Accordingly, the scheduling order already entered affords the government adequate time for the necessary consultations without permitting needless delay during a time when [redacted] is subject to the accrual of significant contempt fines, which the government declined to agree not to enforce during the pendency of [redacted] Motion. [redacted] Status Report at 2.

*3. Accrual of the Contempt Fines*

Third, at the January 10, 2019 status conference, the Court inquired of the parties when each side understood [redacted] $50,000 daily fine to begin accruing, in accordance with the Court's October 5, 2018 Order. To recap the relevant background, on October 5, 2018, the Court granted the government's motion to hold [redacted] in contempt for violating this Court's September 19, 2018 Order, *see* Mem. and Order (Oct. 5, 2018), ECF No. 30, and assessed a daily fine of $50,000 against [redacted] *id.* at 6, which fine "shall only begin accruing seven (7) business days after the Court of Appeals' issuance of a mandate affirming this Court's order," *id.*

at 7. [redacted] appealed but lost. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018). The D.C. Circuit affirmed the October 5, 2018 Order and issued the mandate on December 18, 2018. *See* Mandate, ECF No. 43. After three business days had elapsed from the issuance of the mandate, the Supreme Court entered an order that stayed "the order of the United States District Court for the District of Columbia holding the applicant in contempt, including the accrual of monetary penalties." Order (Dec. 23, 2018), *In re Grand Jury Subpoena*, No. 18A669. The Supreme Court's stay was then lifted on January 8, 2019. Order (Jan. 8, 2019), *In re Grand Jury Subpoena*, No. 18A669.

At the status conference, the parties agreed that fines started accruing on January 9, 2019, the day after the Supreme Court stay was lifted. Status Conf. Tr. (Jan. 10, 2019) at 19:1–6, 21:8–11. By that time, more than seven business days had passed from the issuance of the D.C. Circuit's mandate. The parties' understanding of the accrual date differed from the Court's. Thus, the Court asked the parties to put their understanding of the accrual date in writing. *Id.* at 22:9–18; *see also* Min. Order (Jan. 10, 2019). Following the status conference, the government held to the same position, *see* Gov't's Status Report at 3–5, but [redacted] took a new stance, *see* [redacted] Status Report at 2–3. Led by the Court's understanding, [redacted] now contends that fines start accruing today, January 15, 2019. To reach that conclusion, [redacted] counts three business days—December 19, 20, and 21, 2018—elapsing between the D.C. Circuit's mandate and the Supreme Court's stay. The Supreme Court lifted the stay on January 8, 2019, meaning the next four business days were January 9, 10, 11, and 14, 2019. Thus, [redacted] which still has not complied with this Court's September 19, 2018 Order, started amassing daily $50,000 fines as of today, January 15, 2019.

The Court agrees with [redacted]. The Supreme Court's stay expressly references the elements of this Court's October 5, 2018 Order that held [redacted] in contempt and that imposed, as a sanction for contempt, monetary fines, but does not allude to the portion of the same order that stayed the effective date until seven business days after the D.C. Circuit issued the mandate. Yet, the Supreme Court's order does not communicate any intention to divvy up the parts of this Court's October 5, 2018 Order to which the Supreme Court's stay applies. Rather, the soundest reading of the Supreme Court's stay is that it delays in all respects the effect of this Court's October 5, 2018, tolling this Court's seven-business day stay. To the extent that the Supreme Court's order is ambiguous as to whether the Supreme Court's stay tolls all aspects of this Court's stay, the ambiguity is construed in favor of [redacted] notwithstanding that [redacted] is subject only to civil contempt sanctions.

***4. Remaining Outstanding Issues***

Two issues remain outstanding. First, [redacted] seeks to stay accrual of the $50,000 daily contempt fines until resolution of the pending motion for a declaration that the contempt fines are not enforceable. *See* Bank's Motion for a Stay of the Contempt Fines' Accrual Until this Court Rules on [redacted] Pending Motion for a Declaration ("[redacted] Stay Motion"), ECF No. 56.

[redacted] Stay Motion reveals [redacted] confusion about the operation of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* No matter how many briefs and motions [redacted] files proclaiming immunity from the exercise of this Court's jurisdiction, the Court's authority to impose contempt sanctions on [redacted] and thus for the sanctions to accrue, is secure. *See generally* Mem. Op. (Sept. 19, 2018), ECF No. 20; *In re Grand Jury Subpoena*, No. 18-3071, 2019 WL 125891 (D.C. Cir. Jan. 8, 2019). Nonetheless, [redacted] seeks to stay accrual

of the properly entered contempt sanction because, in [redacted] view, the contempt sanction is unenforceable. Yet, as the D.C. Circuit has said, and already repeated once in this case, the power to impose contempt sanctions against a foreign sovereign and the power to enforce any monetary sanctions are distinct. *In re Grand Jury Subpoena*, 2019 WL 125891, at *7 ("We stick to that practice today, meaning the form of the district court's contempt order was proper. Whether and how that order can be enforced by execution is a question for a later day."); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) ("Hemisphere's contention that whether the court can enforce its contempt sanction is irrelevant to the availability of a contempt order is consistent with the statutory scheme."). Thus, even if [redacted] ultimately prevails on the argument that the fines are unenforceable, a question which has not yet been resolved in this matter, the fines are properly accruing. Therefore, for the same reasons articulated in the Court's last opinion denying [redacted] request for a stay of the Court's October 5, 2018 Order, *see* Mem. and Order (Jan. 10, 2019), ECF No. 48, [redacted] newest motion for a stay also is denied.

Second, the Court's September 19, 2018 Order, which accompanied a Memorandum Opinion explaining the reasons for denying [redacted] Motion to Quash, ordered the government to "submit a report advising the Court whether any portions of the accompanying Memorandum Opinion may be unsealed" no later than the earlier of [redacted] compliance with the subpoena or three months from that order. *See* Order (Sept. 19, 2018), ECF No. 19. Three months now have passed. Thus, consistent with the September 19, 2018 Order, the government must submit a report advising which portions of the Court's September 19, 2018 Memorandum Opinion may be unsealed, particularly in light of the public versions of the D.C. Circuit's judgment and opinions in this matter.

For the foregoing reasons, it is hereby

**ORDERED** that, upon consideration of [redacted] Proposed Order, ECF No. 51-1, the Government's Proposed Order, ECF No. 53-1, and [redacted] Supplemental Proposed Order, ECF No. 55-1, [redacted] counsel shall refrain from making any public statement or statement to the press [redacted] beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court; and it is further

**ORDERED** that the $50,000 daily fine ordered by the Court's October 5, 2018 Order begins accruing on January 15, 2019; and it is further

**ORDERED** that [redacted] Motion for a Stay of the Contempt Fines' Accrual Until this Court Rules on [redacted] Pending Motion for a Declaration, ECF No. 56, is **DENIED**; and it is further

**ORDERED** that, consistent with the Court's September 19, 2018 Order, ECF No. 19, the government, by Tuesday, January 22, 2019, shall submit a report advising the Court whether any portions of the September 19, 2018 Memorandum Opinion, ECF No. 20, may be unsealed.

**SO ORDERED.**

DATE: January 15, 2019

Beryl A. Howell
Chief Judge

# Attachment C

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| *In re* GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-41 (BAH)<br>Chief Judge Beryl A. Howell<br>**FILED UNDER SEAL** |

## MEMORANDUM OPINION

A federal grand jury sitting in the District of Columbia has issued a subpoena to [redacted] to produce certain records in connection with an ongoing investigation conducted by the United States, through the Special Counsel's Office ("SCO"). Pending before the Court is [redacted] Motion to Quash Grand Jury Subpoena ("Mov.'s Mot."), ECF No. 3, on grounds that (1) [redacted] is immune, under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, from compliance with the subpoena, and (2) compliance would require [redacted] to violate foreign law, and thus be "unreasonable or oppressive" under Federal Rule of Criminal Procedure 17(c)(2). For the reasons explained in further detail below, neither argument persuades. [redacted] motion therefore is denied, and [redacted] is ordered to complete production of records responsive to the grand jury subpoena by October 1, 2018.

## I. BACKGROUND

The SCO is investigating foreign interference in the 2016 presidential election and potential collusion in those efforts by American citizens. The SCO has identified certain [redacted] as relevant to the investigation and, on July 11, 2018, the grand jury issued a subpoena to

[redacted] which is [redacted] to produce by, July 27, 2018, any such records held [redacted], in the United States or abroad. *See* Subpoena, ECF No. 3-1.[1]

On July 26, 2018, [redacted] through counsel, expressed to the SCO "concerns that pertain to the potential waiver of its sovereign immunity, as well as with respect to the reach of the subpoena beyond [redacted] Mov.'s Ltr., dated July 26, 2018 ("Mov.'s July 26 Ltr.") at 1, ECF No. 3-2. [redacted] counsel asserted that [redacted] is "an agency or instrumentality of [redacted] under the FSIA" as "a [redacted] by [Country A]," and therefore "is immune from the jurisdiction of U.S. courts as well as the reach of U.S. subpoenas." *Id.* at 1–2. "While [redacted] wishes to cooperate with the Special Counsel's investigation," [redacted] counsel wrote, "it cannot do so at the cost of potentially waiving or undermining its legal position with respect to the applicability of the FSIA and the protections that the FSIA affords [redacted] *Id.* at 2. [redacted] counsel also expressed doubt that any exception to the FSIA applied, noting specifically that the FSIA's exception for cases in which "the action is based upon a commercial activity carried on in the United States by [a] foreign state," 28 U.S.C. § 1605(a)(2), likely did not apply because [redacted] *Id.*[2]

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[1] [redacted]

[2] [redacted] counsel questioned whether this Court has personal jurisdiction over [redacted] *see* Mov.'s July 26 Ltr. at 2, to which the SCO responded that "[t]he subpoena was served on [redacted] not its New York branch," which "is not an independent entity." SCO's Ltr., dated July 30, 2018 at 2, ECF No. 3-3. The SCO argued that "[b]ecause the subpoena was served on [redacted] it is immaterial whether [redacted] has access to or visibility into documents in the possession of [redacted] as [redacted] itself "unquestionably does have such access and visibility." *Id.* (internal quotation marks omitted). The next letter [redacted] counsel sent the SCO made no reference to personal jurisdiction, *see* Mov.'s Ltr., dated Aug. 2, 2018, ECF No. 4-1, and [redacted] has not disputed this Court's personal jurisdiction over [redacted] in either subsequent correspondence with the SCO or its briefs supporting its motion to quash, thus waiving any objection on that ground. *See Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 344 (D.C. Cir. 2018) ("Unlike subject matter jurisdiction, personal jurisdiction is a personal defense that can be waived or forfeited" by "cho[osing] not to brief or argue the question of personal jurisdiction.").

In response, the SCO disagreed "with your suggestion that sovereign immunity or any other legal doctrine relieves your client from the obligation to produce the documents responsive to the subpoena in [redacted]s possession, custody, or control—wherever the documents are located." SCO's Ltr., dated July 30, 2018 ("SCO's July 30 Ltr.") at 1, ECF No. 3-3. The SCO asserted that the FSIA neither "applies in criminal cases [n]or divests the district court of power to enforce the subpoena," and that even if the FSIA applies, the FSIA's commercial activity exception would apply due to [redacted] "[redacted] activities in the United States." *Id.* at 1–2.

On August 2, 2018, [redacted] counsel sought from the SCO "written confirmation . . . that it is permissible . . . to share the grand jury subpoena with other personnel at [redacted] who would be involved in collecting the documents requested, including personnel at [redacted] in [City A] and at the [redacted] that may have responsive information." Mov.'s Ltr., dated Aug. 2, 2018 ("Mov.'s Aug. 2 Ltr.") at 1, ECF No. 4-1.[3] While reiterating [redacted] desire "to cooperate with the grand jury's investigation" and to find "a resolution that would provide the [SCO] with the documents requested," [redacted] emphasized its continuing "concerns on how its protections under the [FSIA] [redacted] could be impacted—or waived entirely—by producing documents responsive to the grand jury subpoena," as well as concern that compliance would violate "applicable law in [Country A] [redacted] *Id.* at 1–2.[4] As to the latter concern, [redacted] proposed that it produce responsive documents "consistent with, and as permitted by, the applicable laws of the jurisdictions in which the information may [be] located," subject to three conditions: the SCO's (1) agreement that [redacted] production "is not intended to be either an express or

[3] City A is Cairo, Egypt.
[4] Country B is the People's Republic of China.

implied waiver of [redacted] protections under the FSIA," (2) representation "that [the SCO] has a compelling need for the records requested," and (3) agreement "to a 30-day extension of the subpoena's return date, up to and including September 3, 2018, to give [redacted] adequate time to collect and process the [redacted]." *Id.* at 2.

The SCO responded the same day, informing [redacted] that the SCO "cannot agree to all of the representations made in your letter," but "offer[ing] the following assurances regarding your client's production of materials responsive to the subpoena." SCO's Ltr., dated Aug. 2, 2018 ("SCO's Aug. 2 Ltr.") at 1, ECF No. 4-2. The SCO "agree[d] that in the event the [FSIA] were deemed" to apply, [redacted] "production of documents responsive to the instant grand jury subpoena is not intended to constitute either an express or implied waiver of any protections [redacted] might be entitled to pursuant to the FSIA." *Id.* The SCO further represented that it had "a compelling need for records that are responsive to the grand jury subpoena," while maintaining nonetheless that the government need not "demonstrate such a compelling need in order to compel compliance with the subpoena." *Id.* Finally, the SCO agreed to extend the subpoena's return date by one week, to August 10, 2018. *Id.*

On August 6, 2018, [redacted] counsel communicated to the SCO his [redacted]

[redacted]

[redacted]," and that compliance with the subpoena thus "could constitute [redacted]," and requested that the SCO "share any thoughts your office has on this issue." *Id.* The SCO responded that "[w]e will take a look at this." SCO's Email, dated Aug. 7, 2018, ECF No. 4-3.

[redacted] counsel then shared "a little more color on the situation and what I've learned since" sending the prior email. Mov.'s Email, dated Aug. 7, 2018, ECF No. 4-3. Although [redacted] "has already begun pulling together the documents responsive to the subpoena," [redacted] counsel said, "before producing these to your office," [redacted] *Id.* At the same time, [redacted] counsel assured the SCO that [redacted] *Id.* Acknowledging that "we're not privy to the exact nature of your investigation and the specific need for [redacted] *Id.*

On August 14, 2018, the SCO responded that [redacted] *Id.* at 2. In an accompanying email, dated one day later, the SCO stated that "[w]e will extend the return date on the subpoena to [August 16, 2018], but do not anticipate granting any further extensions." SCO's Email, dated Aug. 15, 2018 ("SCO's Aug. 15 Email"), ECF No. 4-4.

In response to the SCO's letter, [redacted] counsel asked whether (1) the SCO would [redacted] Mov.'s Email, dated Aug. 14, 2018 ("Mov.'s Aug. 14 Email"), ECF No. 4-4. The SCO objected, cautioning [redacted]

[redacted] counsel subsequently "requested a further extension of the deadline for compliance with the subpoena until early September." Mov.'s Email, dated Aug. 15, 2018, ECF No. 4-4. The SCO denied this request, stating that (1) "[t]he subpoena was [redacted] over one month ago," (2) "[f]rom the very inception of our discussions about [redacted] concerns and how those concerns could be allayed, we have made clear to you that in light of our investigative exigencies we were not able to agree to a lengthy extension of the return date," (3) "[i]n an attempt to allow [redacted] to fully consider the issue, we nonetheless granted extensions of that deadline totaling almost 3 weeks," and (4) "we told you when we agreed to your last extension request that it would likely be our final grant of an extension." SCO's Email, dated Aug. 16, 2018, ECF No. 4-4.

On August 16, 2018, [redacted] filed a motion to quash the grand jury subpoena. *See* Mov.'s Mot.[5] The SCO's opposition, *see* SCO's Opp'n Mov.'s Mot. ("SCO's Opp'n"), ECF No. 4, was accompanied by a motion for leave to file an *ex parte*, *in camera* supplement, *see* SCO's Mot. Leave File *Ex Parte* Suppl. ("SCO's Mot. *Ex Parte* Suppl."), ECF No. 5, which the Court granted, *see* Order Granting SCO's Mot. *Ex Parte* Suppl., ECF No. 6. [redacted] filed a reply on August 31, 2018. *See* Mov.'s Reply SCO's Opp'n ("Mov.'s Reply"), ECF No. 8. Following a hearing on September 11, 2108, at which the SCO confirmed that the instant subpoena's issuance to an instrumentality of a foreign government was "approved in the normal matter . . . within the ranks of the Department of Justice," Hr'g Tr. (Sept. 11, 2018) at 39:16–23, ECF No. 16, and the

[5] [redacted] also filed a motion to seal case, *see* Mov.'s Mot. Seal Case, ECF No. 1, which the Court granted, *see* Order Granting Mov.'s Mot. Seal Case, ECF No. 2.

SCO's filing of two *ex parte*, *in camera* submissions, *see* Order Granting SCO's Mot. *Ex Parte* Suppl.; Minute Order, dated Sept. 14, 2018, [redacted] motion to quash now is ripe for review.

## II. LEGAL STANDARD

"On motion made promptly, the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c)(2). "[O]ne who relies on foreign law assumes the burden of showing that such law prevents compliance with the court's order." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987); *accord SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000). "Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source." FED. R. CRIM. P. 26.1.

## III. DISCUSSION

[redacted] seeks to quash the grand jury subpoena on grounds that (1) the FSIA grants [redacted] immunity from compliance with the subpoena and the jurisdiction of this Court to enforce the subpoena, and (2) compliance would be unreasonable or oppressive, as [redacted] would violate foreign law. As explained below, neither argument persuades.

### A. The FSIA Does Not Immunize [redacted] From Compliance With the Grand Jury Subpoena

[redacted] contends that as an agency or instrumentality of Country A, it "is immune from [the] jurisdiction of U.S. courts, as well as the reach of U.S. subpoenas." Mov.'s Mem. Supp. Mot. ("Mov.'s Mem.") at 4, ECF No. 3.[6] Foreign states and their agencies and instrumentalities

[redacted]

generally are immune from the jurisdiction of American courts, but the FSIA recognizes an exception to immunity for certain actions relating to foreign states' commercial activities. 28 U.S.C. §§ 1603(a), 1604, 1605(a)(2). Assuming the FSIA's grant of immunity applies outside civil cases, the exceptions do as well. The SCO, through an *ex parte*, *in camera* submission, has demonstrated that the commercial activity exception applies here. The FSIA thus does not immunize [redacted] from compliance with the grand jury subpoena.

**1. Assuming the FSIA Applies Outside Civil Cases, the FSIA's Exceptions to Immunity Apply Outside Civil Cases As Well**

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to certain exceptions. 28 U.S.C. § 1604. The FSIA thus "renders a foreign government 'presumptively immune from the jurisdiction of United States courts unless one of the Act's express exceptions to sovereign immunity applies.'" *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017) (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 n.1 (2016)). [redacted] argues that these exceptions, set out in 28 U.S.C. §§ 1605–07, apply only to civil cases and, consequently, that the FSIA grants foreign states unqualified immunity outside the civil context. *See* Mov.'s Reply at 4. The SCO disputes that the FSIA applies outside the civil context, but contends that, if the statute applies here, the exceptions must apply as well. *See* SCO's Opp'n at 6–11. The Court assumes, without deciding, that the FSIA applies to grand jury investigative matters and concludes, contrary to [redacted] position, that the FSIA's exceptions to immunity, which are not by their plain terms limited to civil cases, apply outside the civil context as well.

The FSIA's commercial activity exception, for example, provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state

> elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). This language is not textually limited to civil matters. To the contrary, Section 1605(a)(2)'s unqualified language provides that the exception applies "in any case." *Id.*; *see SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) ("[T]the word 'any' naturally carries an expansive meaning.' . . . When used (as here) with a singular noun in affirmative contexts, the word 'any' ordinarily refers to a member of a particular group or class without distinction or limitation and in this way implies *every* member of the class or group." (quoting OXFORD ENGLISH DICTIONARY (3d ed. Mar. 2016) (alterations and internal quotation marks omitted))). The FSIA's other exceptions to immunity likewise apply "in any case" or "in any action" without any express limitation to civil matters. *See* 28 U.S.C. § 1605(a), (b) (enumerating six exceptions to sovereign immunity that apply "in any case"); *id.* § 1605(d) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage."); *id.* § 1607 (enumerating counterclaim-based exceptions to immunity that apply "[i]n any action").

Even though the FSIA's commercial activity exception is not facially limited to civil cases, [redacted] argues nonetheless that courts cannot exercise jurisdiction over non-plaintiff foreign states in non-civil matters because 28 U.S.C. §1330(a), the FSIA's jurisdictional statute, confers jurisdiction only over "civil action[s] against a foreign state." Mov.'s Reply at 4 (citing 28 U.S.C. § 1330(a)). Section 1330(a) does not facially purport to be the exclusive basis for exercising jurisdiction over a non-plaintiff foreign state, however.[7] Jurisdiction here is proper

[7] The general diversity jurisdiction statute confers jurisdiction, subject to a greater-than-$75,000 amount in controversy requirement, over civil actions between "a foreign state . . . as plaintiff and citizens of a State or of different States," 28 U.S.C. §1332(a)(4), but does not confer jurisdiction over actions against foreign states.

under 28 U.S.C. § 3231, as the grand jury is investigating "offenses against the laws of the United States." 28 U.S.C. § 3231.

[redacted] posits that jurisdiction can lie only under Section 1330(a), not under Section 3231, because "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). "[O]btaining jurisdiction over a foreign state" under the FSIA, *id.*, however, requires merely that one of the FSIA's substantive exceptions to immunity apply, not also, as [redacted] argues, that jurisdiction lie under Section 1330(a) itself. Indeed, *Amerada Hess* expressly recognizes that jurisdiction over a foreign state may lie under a statute other than Section 1330(a), so long as one of the FSIA's exceptions to immunity applies. *See id.* at 438–39 ("Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner."). The Supreme Court elsewhere has explained that "subject matter jurisdiction in any [action against a foreign state] depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). *Amerada Hess* thus best is read merely to reject a litigant's ability to make an end-run around the FSIA's substantive immunity provisions by invoking a separate jurisdictional statute, such as the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, as the plaintiff there attempted, *see* 488 U.S. at 432. A litigant who demonstrates that one of the FSIA's exceptions to immunity applies thus may rely on a jurisdictional statute other than Section 1330(a), such as Section 3231.

This reading of *Amerada Hess* best accords with the FSIA's language. Section 1604 provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States . . . *except* as provided in sections 1605 to 1607." 28 U.S.C. § 1604 (emphasis added).

This mandatory phrasing naturally implies that *if* an exception to immunity in Sections 1605 through 1607 applies, a foreign state *shall not* have immunity. Sections 1605 through 1607 do not distinguish between civil and non-civil matters. *See id.* §§ 1605–07. To conclude that a foreign state is entitled to immunity in a non-civil matter despite that an exception to immunity applies "as provided in sections 1605 to 1607," *id.* § 1604, does not square with Section 1604.

Language in another section of the statute supports this reading of the FSIA. Section 1602 instructs courts to resolve "[c]laims of foreign states to immunity . . . in conformity with the principles *set forth in this chapter*." *Id.* § 1602 (emphasis added). The FSIA's exceptions to immunity, *see id.* §§ 1605–07, and Section 1602 are located in the same chapter, *see id.* ch. 97, while Section 1330(a) is located in a separate chapter, *see id.* ch. 85. To conclude that a foreign state has immunity because an action falls outside Section 1330(a)'s scope, notwithstanding that an exception to immunity otherwise would apply, would be to resolve a claim of immunity "in conformity with" "principles" other than those "set forth in this chapter," *id.* § 1602, in violation of Section 1602.

Nor would allowing litigants to invoke a district court's jurisdiction over a foreign state by relying on statutes other than Section 1330(a) render Section 1330(a) superfluous, as Section 1330(a)'s enactment allowed district courts to hear actions over which jurisdiction otherwise did not exist. Section 1330(a) grants the district courts "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). At the time the FSIA was enacted, the general federal question jurisdiction statute, 28 U.S.C. § 1331, granted jurisdiction over "civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution,

laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1976), *amended by* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369.[8] Section 1330(a) thus allowed district courts to hear two categories of actions that Section 1331, as then written, did not. First, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of the amount in controversy. Second, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of whether the litigant had satisfied the well-pleaded complaint rule, which requires "that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Verlinden B.V.*, 461 U.S. at 494 (recognizing that the well-pleaded complaint rule does not apply to actions under Section 1330(a)).

Other specialized jurisdictional statutes in existence when the FSIA was enacted, such as the ATS, 28 U.S.C. § 1333 (admiralty, maritime, and prize), 28 U.S.C. § 1335 (interpleader), 28 U.S.C. § 1337 (commerce and antitrust), and 28 U.S.C. § 1338 (intellectual property), likewise did not grant the full scope of jurisdiction Section 1330(a) provides. *Cf. Amerada Hess*, 488 U.S. at 437 (observing that these jurisdictional statutes predated the FSIA). The FSIA's omission of any statute specifically conferring jurisdiction over non-civil matters against foreign states thus simply may reflect Congress's judgment that the existing scope of federal jurisdiction over non-civil actions against foreign states required no expansion.

For these reasons, the FSIA's exceptions to immunity are co-extensive with the FSIA's scope of potential immunity, such that if FSIA immunity extends outside the civil context, so too do the exceptions.

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[8] Section 1331(a)'s amount-in-controversy requirement did not apply to actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," 28 U.S.C. § 1331(a) (1976), but this exception rarely if ever would apply in an action against a foreign state.

**2. The Commercial Activities Exception**

The FSIA's commercial activities exception sets, out in three separate clauses, the circumstances under which a foreign state is not "immune from the jurisdiction of courts of the United States"—when "the action is based upon" (1) "a commercial activity carried on in the United States by the foreign state," (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "[C]ommercial activity" is "a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). An activity's "commercial character" is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than . . . to its purpose." *Id.* A foreign state's acts are "commercial" within the FSIA's meaning "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Moreover, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Id.* (internal quotation marks omitted).

As to the exception's first clause, "commercial activity carried on in the United States by a foreign state" is "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). "Thus, to invoke the district court's jurisdiction under clause one, the plaintiff's claim must be based upon some commercial activity by the foreign state that had substantial contact with the United States." *Odhiambo v. Republic of*

*Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014) (internal quotation marks omitted). As to the third clause, "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity," but such effect need not be "substantial" or "foreseeable." *Weltover, Inc.*, 504 U.S. at 618 (alteration and internal quotation marks omitted); *see also Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) ("A direct effect is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." (alterations and internal quotation marks omitted)).

The Supreme Court has explained that "an action is 'based upon' the particular conduct that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *see also Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) ("[A] court's jurisdiction under the Foreign Sovereign Immunities Act turns on the 'gravamen,' or 'essentials,' of the plaintiff's suit." (quoting *Sachs*, 136 S. Ct. at 395–97)).[9] "[T]he particular conduct that constitutes the 'gravamen,'" *Sachs*, 136 S. Ct. at 396, of an action to compel enforcement of or quash a grand jury subpoena most sensibly is said to be such conduct (1) that is part of "the general subject of the grand jury's investigation" and (2) as to which there exists a "reasonable possibility that the category of materials the Government seeks will produce information" that is "relevant." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991). This yields the following rule: a grand jury subpoena matter fits within the commercial activity exception if an activity or act of the kind Section 1605(a)(2) describes is part of the general subject of the grand jury's

[9] In *Nelson v. Saudi Arabia*, the Supreme Court said that "the phrase 'based upon,'" as used in Section 1605(a)(2), "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. 349, 357 (1993). The D.C. Circuit, relying on *Nelson*'s language, explained that "a claim is 'based upon' commercial activity if the activity establishes one of the elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Odhiambo*, 764 F.3d at 36. More recently, however, *Sachs* rejected a "one-element approach" to Section 1605(a)(2), holding that a court instead must "zero[] in on the core of [a plaintiff's] suit." 136 S. Ct. at 396.

investigation, and there exists a reasonable possibility that the category of materials the subpoena identifies will produce information relevant to such activity or act.[10]

**3. Analysis**

The SCO argues that the commercial activity exception applies here. SCO's Opp'n at 10. Through an *ex parte*, *in camera* submission, the SCO has elaborated on the relationship between [redacted] Section 1605(a)(2) activities or acts and the materials sought to be produced. Having thoroughly reviewed this *ex parte*, *in camera* submission, the Court is satisfied that the SCO has met its burden to show that (1) a Section 1605(a)(2) activity or act is part of the general subject of the grand jury's investigation and (2) a reasonable possibility exists that the instant subpoena will produce information relevant to such activity or act. *Cf. United States v. Nixon*, 418 U.S. 683, 700 (1974) ("Our conclusion is based on the record before us, much of which is under seal.").[11] The contents of the SCO's *ex parte*, *in camera* submission overcome any inference one otherwise might draw from [redacted] Mov.'s Mem. at 6 (parentheses omitted).

[redacted] argues that the commercial activity exception does not apply because the SCO "argues generically that the exception applies because [redacted]

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[10] The SCO argues that the relevant standard here is not *R. Enterprises, Inc.*'s standard to determine a grand jury subpoena's relevancy, but rather the standard to determine whether a court has personal jurisdiction to enforce a subpoena compelling production of [redacted] *See* SCO's Opp'n at 10–11. The commercial activity exception applies only where a Section 1605(a)(2) activity or act "constitutes the 'gravamen' of the suit," however. *Sachs*, 136 S. Ct. at 396 (2015). Although establishing personal jurisdiction over an entity is necessary to obtain relief in the sense that a court lacks authority to grant relief against an entity not within the court's personal jurisdiction, *see Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1779 (2017), personal jurisdiction alone cannot ordinarily be said to be the "gravamen" of a matter as *Sachs* uses that term, 136 S. Ct. at 396. A Section 1605(a)(2) activity or act thus may establish a court's personal jurisdiction over an entity without establishing a court's subject-matter jurisdiction under the FSIA.

[11] On September 14, 2018, the Court directed the government to submit an *ex parte*, *in camera* submission "addressing the following question: whether an act or activity of the kind described in 28 U.S.C. § 1605(a)(2) establishes a reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Minute Order, dated Sept. 14, 2018. On September 17, 2018, the SCO filed a submission responsive to the Court's order.

[redacted] without specifying any "jurisdictional nexus" between a Section 1605(a)(2) activity or act and the subpoenaed materials. Mov.'s Reply at 4. Obviously, [redacted] cannot address the contents of the SCO's *ex parte*, *in camera* submission, which persuades the Court that a nexus exists between [redacted] Section 1605(a)(2) activities or acts and the materials sought to be produced, and thus that the instant matter is "based upon" such activities or acts. The Court recognizes [redacted] difficult position in not being privy to the information reviewed and relied upon in resolving the pending motion. *See In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982) ("[A]ppellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case."). The law is well-settled, however, that courts may "use *in camera*, *ex parte* proceedings to determine the propriety of a grand jury subpoena" when "necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998); *see also In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006); *In re Grand Jury Investigation*, No. MC 17-2336 (BAH), 2017 WL 4898143, at *7 (D.D.C. Oct. 2, 2017). "The alternatives" to *ex parte*, *in camera* review here would "sacrific[e] the secrecy of the grand jury." *John Doe Corp.*, 675 F.2d at 490; *see also R. Enters.*, 498 U.S. at 299 ("Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand jury proceedings.'" (internal quotation marks omitted)).

For these reasons, the FSIA does not immunize [redacted] from complying with the subpoena.

**B. Compliance With the Subpoena Would Not Be Unreasonable or Oppressive**

[redacted] further argues that compliance with the grand jury subpoena would require violating [redacted], and thus be unreasonable and oppressive. [redacted] fails to show, however, that the subpoena and foreign law impose conflicting obligations and, in any event, the

grand jury's strong need for the materials sought [redacted] warrant the subpoena's enforcement notwithstanding any foreign prohibition on disclosure. Foreign law thus does not excuse [redacted] from complying with the subpoena.

**1. Compliance With the Instant Subpoena Would Not Violate Foreign Law**

[redacted] argues that complying with the subpoena would require violating Country A's Banking Law, Country A's Anti-Money Laundering Law ("AML Law"), and unspecified law in Country B. For the reasons that follow, [redacted] fails to show that the grand jury subpoena and foreign law impose conflicting legal obligations.

[redacted]

12 [redacted]

[redacted]

[redacted]

[redacted] cites no contrary authority co[redacted], relying instead on conclusory declarations by [redacted] own Country A in-house and retained counsel, which themselves cite no legal authority on this question of [redacted]. *See* Decl. of Ashraf Shaaban, Mov.'s Group Legal Counsel ("Shaaban Decl.") ¶ 7, ECF No. 3-6; Suppl. Decl. of Mona Zulficar ("Suppl. Zulficar Decl.") ¶ 4, ECF No. 12. The Court gives these declarations little weight. *See Doak v. Johnson*, 798 F.3d 1096, 1107 (D.C. Cir. 2015) (declining, in the summary judgment context, to credit "bare, conclusory statement[s] . . . in [a] declaration").

[redacted] *Id.* As an initial matter, the Court teased this argument from the declaration, as [redacted] failed to raise this argument in its briefs. This argument is therefore waived. *See Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1142 (D.C. Cir. 1999) ("We routinely and for good reason refuse to consider contentions not raised in a party's brief."). The argument fares no better on the merits, [redacted]

[redacted]

[redacted] identifies no contrary authority other than assertions by [redacted]

[redacted] neither of whom cite or analyze Country A legal authorities. The Court simply need not credit such conclusory opinions. *See Doak*, 798 F.3d at 1107. [redacted]

[redacted]

[redacted]

Finally, [redacted] argued at the September 11 hearing and via declarations of [redacted], though not through its briefs, [redacted] *See* Hr'g Tr. at 20:23–24:10. [redacted] has waived this argument in two ways. First, [redacted] failure to raise this argument in any briefs constitutes waiver. *See Berger*, 170 F.3d at 1142. Second, [redacted] are entirely conclusory, offering no substantive analysis and failing even to identify [redacted] *see also Doak*, 798 F.3d at 1107; *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (internal quotation marks omitted)).

For these reasons, compliance with the subpoena at issue would not require [redacted] to violate foreign law.

### 2. Enforcement of the Grand Jury Subpoena is Required Even If Disclosure Violates Foreign Law

Even if complying with the grand jury subpoena would require [redacted] to violate foreign law, the government's important interest in obtaining the materials sought [redacted] justify compelling compliance with this subpoena nonetheless. "[A]lthough courts recognize comity as an important objective, there is little doubt that a United States Court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary." *In re Sealed Case*, 832 F.2d 1268, 1283 (D.C. Cir. 1987) (alterations and internal quotation marks omitted); *see also In re Sealed Case*, 825 F.2d at 497–98 ("[A] court's ability to order a person to produce documents in contravention of foreign law [] is thought to be acceptable.").[13] In the grand jury context, courts regularly have concluded that government law enforcement interests outweigh [redacted] and subpoena recipients' interest in avoiding conflicting legal obligations. [redacted]

[13] *Braswell v. United States* held that a "custodian of corporate records" cannot "resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment," 487 U.S. 99, 100 (1988), abrogating that aspect of *In re Sealed Case* holding otherwise, *see* 832 F.2d at 1274–82; *see also In re Sealed Case (Gov't Records)*, 950 F.2d 736, 739 n.5 (D.C. Cir. 1991) ("*Braswell* effectively rejects the portion of this court's opinion in *In re Sealed Case* . . . that recognizes a corporate custodian's right to resist a grand jury subpoena on the ground that the act of production itself might incriminate him."). *Braswell* did not purport to abrogate the aspect of *In re Sealed Case* recognizing district courts' power to enforce grand jury subpoenas compelling disclosure prohibited by foreign law, however, and *In re Sealed Case* remains good law in this respect.

(5th Cir. 1976) ("[T]his court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states."); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (expressing "great reluctance . . . to countenance any device that would place relevant information beyond the reach of this duly impaneled Grand Jury or impede or delay its proceedings," and requiring enforcement of a grand jury subpoena notwithstanding a foreign law prohibition).[14]

Section 442(1)(c) of the *Restatement (Third) of the Foreign Relations Law of the United States* directs that "[i]n deciding whether to issue an order directing production of information located abroad," a court "should take into account" (1) "the importance to the investigation . . . of the documents or other information requested," (2) "the degree of specificity of the request," (3) "whether the information originated in the United States," (4) "the availability of alternative means of securing the information," and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987). The Supreme Court, citing a draft version of Section 442(1)(c), identified these factors as "relevant to

14 [redacted]

any comity analysis." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).[15]

The subpoena at issue cannot be faulted for insufficient specificity, and the SCO does not argue that the information sought originated in the United States. The SCO's *ex parte*, *in camera* submission, meanwhile, persuades the Court that the materials sought are important to the grand jury's investigation and that failure to secure the materials would undermine important interests of the United States. [redacted] For these reasons, under the circumstances presented, the Court concludes that the subpoena should be enforced.

Section 442(2) of the *Restatement (Third)* further provides that "[i]f disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national," an American court "*may* require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available," and "*should not ordinarily* impose sanctions of contempt . . . on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a)." *Restatement (Third)* § 442(2)(a)–(b) (emphases added). As the emphasized terms indicate, however, these provisions are not absolute, and their

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[15] Additionally, several circuits have applied the Section 442(1)(c) factors in determining whether to require discovery on foreign soil. *See, e.g.*, *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474–76 (9th Cir. 1992); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1281–82 (7th Cir. 1990); *see also In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002) (applying Section 442(1)(c) in the context of a grand jury subpoena).

application may be inappropriate under particular circumstances. [redacted]

*In re Sealed Case*, which voiced "considerable discomfort" with the idea "that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question," 825 F.2d at 498, involved circumstances materially different than those presented here. The consideration that was "[m]ost important to [the *Sealed Case* panel's] decision [wa]s the fact that" contempt "sanctions represent[ed] an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory." *Id.* That consideration is absent here, as [redacted] only substantive arguments assert that compliance with the subpoena would require [redacted] *See* Mov.'s Mem. at 7–8. Moreover, in *Sealed Case* "the government concede[d] that it would be impossible for [redacted] to comply with the contempt order without violating the laws of Country Y on Country Y's soil." 825 F.2d at 498. Here, in contrast, the SCO asserts that compliance with the subpoena would not require [redacted] to violate foreign law, and the record before the Court supports this conclusion, for the reasons discussed above. [redacted]

16 [redacted] that [redacted]

[redacted] As already discussed, [redacted]

The *Sealed Case* panel "emphasize[d] [] the limited nature of our holding on this issue," and explained that "[i]f any of the facts we rest on here were different, our holding could well be different." *Id.* Given the significant factual dissimilarity between that and the instant matter, enforcing the instant grand jury subpoena does not cause the "considerable discomfort," *id.* at 498, the *Sealed Case* panel expressed.

## IV. CONCLUSION

For the foregoing reasons, [redacted] Motion to Quash Grand Jury Subpoena is denied. [redacted] shall complete production of the subpoenaed records by October 1, 2018.

An appropriate Order accompanies this Memorandum Opinion.

**Date:** September 19, 2018

BERYL A. HOWELL
Chief Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| *In re* GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-41 (BAH)<br>Chief Judge Beryl A. Howell<br>**Filed Under Seal** |

## MEMORANDUM AND ORDER

On January 8, 2019, the government requested that a status conference be scheduled, without identifying the specific issues requiring the Court's involvement. *See* Letter (Jan. 8, 2019), ECF No. 44; *see also* Min. Order (Jan. 9, 2019) (granting request). The next day, [redacted] filed a Combined Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [redacted] Property is Immune from Execution or Attachment and Motion for a Stay of this Court's Contempt Order Pending the Supreme Court's Disposition of [redacted] Petition for a Writ of Certiorari ("[redacted] Motion"), ECF No. 45.

At the status conference, held on January 10, 2019, the parties raised three issues: (1) [redacted] counsel's desire to make a public statement to clarify the identity of its client; (2) the briefing schedule for [redacted] Motion; and (3) the date that sanctions under the Court's October 5, 2018 Order, ECF No. 30, would begin accruing. Those three issues, as well as two other outstanding issues, are addressed in this Memorandum and Order.

*1. Law Firm's Request to Make a Public Statement*

As many members of the media have speculated, and as the parties are plainly aware, this case arises from Special Counsel Robert Mueller's investigation into possible interference in the 2016 presidential election. Consequently, this case has attracted and continues to attract inordinate media attention. *See, e.g.*, Josh Gerstein & Darren Samuelsohn, *Mueller Link Seen in Mystery Grand Jury Appeal*, POLITICO (Oct. 24, 2018), https://www.politico.com/story/2018/10/24/mueller-investigation-grand-jury-roger-stone-friend-938572; Katelyn Polantz, *Mystery Mueller Mayhem at a Washington Court*, CNN (Dec. 15, 2018), https://www.cnn.com/2018/12/14/politics/mueller-grand-jury-mysterious-friday/index.html; Robert Barnes, Devlin Barrett, & Carol D. Leonnig, *Supreme Court Rules Against Mystery Corporation from 'Country A' Fighting Subpoena in Mueller Investigation*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-against-mystery-corporation-from-country-a-fighting-subpoena-in-mueller-investigation/2019/01/08/a39b61ac-0d1a-11e9-84fc-d58c33d6c8c7_story.html.

When the D.C. Circuit issued the abridged judgment affirming this Court's October 5, 2018 Order, the judgment disclosed that the subpoena recipient is a foreign-owned corporation. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018) (referring to the subpoena recipient as "a corporation … owned by Country A"). [redacted]

At the January 10, 2019 status conference, [redacted] counsel informed the Court that attorneys and employees at their law firm have received threatening messages. [redacted] asked for permission to make the following public statement [redacted]

The government objected to [redacted] request, arguing that any public comment [redacted]

After hearing the parties' arguments, the Court ordered that [redacted] counsel "[redacted], and may

not say anything other than that counsel represents the "foreign corporation that's referred to in [the D.C. Circuit's] opinion, [redacted] counsel requested a written order. *Id.* at 15:21–23. Thus, the parties were instructed, by January 11, 2019, to submit a joint status report proposing a written order. Min. Order (Jan. 10, 2019). Rather than submitting jointly, the parties submitted competing proposals. *See* Bank's 1st Proposed Order, ECF No. 51-1; Gov't's Proposed Order, ECF No. 53-1.

[redacted] initial proposed order would broadly preclude either party from making "any statement to the press other than 'No comment.'" *See* [redacted] 1st Proposed Order. Conversely, the government proposed that the Court make a finding of "a substantial likelihood that dissemination of the proposed disclosure would materially prejudice the due administration of justice and be adverse to [redacted] interests," and that the Court preclude [redacted] counsel "from making materially identical statements that confirm their representation of the subpoena recipient in this matter or describe the recipient." *See* Gov't's Proposed Order. Thereafter, on January 15, 2019, [redacted] supplemented its prior proposal, *see* [redacted] Supp. Proposed Order, ECF No. 55-1. The new proposed order would restrict [redacted] counsel from making any statement [redacted] but permit [redacted] counsel to confirm its representation of the subpoena recipient. *Id.* Although [redacted] counsel maintains that any limitation of its public statements violates the First Amendment, the supplemental proposed order, [redacted] counsel contends, does the least harm. *See* Supp. to [redacted] Status Report at 2–4, ECF No. 55.

Each party's initial proposal is too broad. For example, [redacted] proposal is limitless, omitting even any language that, at a minimum, would confine the Court's order to this case. At

the same time, the government's proposal would preclude [redacted] from publicly commenting on a fact that, for all intents and purposes, is already known: that [redacted] counsel represents the subpoena recipient in this case. Only [redacted] supplemental proposal matches the needs of this case. The Court's order must be limited so as to enforce only the limited measure of secrecy needed to ensure the fair administration of justice and the continuing requirement of grand jury secrecy. Therefore, as directed at the status conference, [redacted] counsel is ordered not to make any public statement or statement to the press that comments on the identity of the recipient of the grand jury subpoena in this case beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court.

*2. Briefing Schedule on [redacted] Motion*

The second issue raised at the January 10, 2019 status conference and addressed separately in the parties' post-conference submissions is the briefing schedule for [redacted] Motion, insofar as [redacted] seeks an order declaring the Court's October 5, 2018 Order unenforceable. While the Court promptly issued a briefing schedule, *see* Min. Order (Jan. 11, 2019), that order merits further explanation.

The parties were unable to reach an agreement about a schedule to govern briefing for [redacted] Motion. [redacted] noting that this matter has been litigated expeditiously at every other juncture and citing the unfairness of the government reserving, on the one hand, the right to request escalation of the contempt fines and, on the other hand, resisting an expedited briefing schedule, asked that the government be ordered to respond to [redacted] Motion by January 14, 2019, with [redacted] reply due January 16, 2019. *See* [redacted] Status Report at 1–2, ECF No. 51. The government, for its part, noting the need to consult with other government components

before submitting a response during a period of a partial government shutdown, asked to have until January 23, 2019 to respond to [redacted] Motion, in effect applying this Court's default rule that parties in criminal matters have 14 days to respond to a motion. *See* Gov't's Status Report at 2, ECF No. 53 (citing Local Criminal Rule 47(b)).

Neither party's proposed schedule was adopted; instead, the scheduling order provides the government until January 18, 2019 to respond to [redacted] Motion and [redacted] until January 22, 2019 to reply. *See* Min. Order (Jan. 11, 2019).

To date, the government has, as [redacted] underscores, pushed for prompt resolution of legal issues raised in this case, and the need for expeditious resolution of all contested legal issues arising from this grand jury remains pressing, not only because of the issues at stake but also [redacted]. Accordingly, the scheduling order already entered affords the government adequate time for the necessary consultations without permitting needless delay during a time when [redacted] is subject to the accrual of significant contempt fines, which the government declined to agree not to enforce during the pendency of [redacted] Motion. [redacted] Status Report at 2.

*3. Accrual of the Contempt Fines*

Third, at the January 10, 2019 status conference, the Court inquired of the parties when each side understood [redacted] $50,000 daily fine to begin accruing, in accordance with the Court's October 5, 2018 Order. To recap the relevant background, on October 5, 2018, the Court granted the government's motion to hold [redacted] in contempt for violating this Court's September 19, 2018 Order, *see* Mem. and Order (Oct. 5, 2018), ECF No. 30, and assessed a daily fine of $50,000 against [redacted] *id.* at 6, which fine "shall only begin accruing seven (7) business days after the Court of Appeals' issuance of a mandate affirming this Court's order," *id.*

at 7. [redacted] appealed but lost. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018). The D.C. Circuit affirmed the October 5, 2018 Order and issued the mandate on December 18, 2018. *See* Mandate, ECF No. 43. After three business days had elapsed from the issuance of the mandate, the Supreme Court entered an order that stayed "the order of the United States District Court for the District of Columbia holding the applicant in contempt, including the accrual of monetary penalties." Order (Dec. 23, 2018), *In re Grand Jury Subpoena*, No. 18A669. The Supreme Court's stay was then lifted on January 8, 2019. Order (Jan. 8, 2019), *In re Grand Jury Subpoena*, No. 18A669.

At the status conference, the parties agreed that fines started accruing on January 9, 2019, the day after the Supreme Court stay was lifted. Status Conf. Tr. (Jan. 10, 2019) at 19:1–6, 21:8–11. By that time, more than seven business days had passed from the issuance of the D.C. Circuit's mandate. The parties' understanding of the accrual date differed from the Court's. Thus, the Court asked the parties to put their understanding of the accrual date in writing. *Id.* at 22:9–18; *see also* Min. Order (Jan. 10, 2019). Following the status conference, the government held to the same position, *see* Gov't's Status Report at 3–5, but [redacted] took a new stance, *see* [redacted] Status Report at 2–3. Led by the Court's understanding, [redacted] now contends that fines start accruing today, January 15, 2019. To reach that conclusion, [redacted] counts three business days—December 19, 20, and 21, 2018—elapsing between the D.C. Circuit's mandate and the Supreme Court's stay. The Supreme Court lifted the stay on January 8, 2019, meaning the next four business days were January 9, 10, 11, and 14, 2019. Thus, [redacted] which still has not complied with this Court's September 19, 2018 Order, started amassing daily $50,000 fines as of today, January 15, 2019.

The Court agrees with [redacted] The Supreme Court's stay expressly references the elements of this Court's October 5, 2018 Order that held [redacted] in contempt and that imposed, as a sanction for contempt, monetary fines, but does not allude to the portion of the same order that stayed the effective date until seven business days after the D.C. Circuit issued the mandate. Yet, the Supreme Court's order does not communicate any intention to divvy up the parts of this Court's October 5, 2018 Order to which the Supreme Court's stay applies. Rather, the soundest reading of the Supreme Court's stay is that it delays in all respects the effect of this Court's October 5, 2018, tolling this Court's seven-business day stay. To the extent that the Supreme Court's order is ambiguous as to whether the Supreme Court's stay tolls all aspects of this Court's stay, the ambiguity is construed in favor of [redacted] notwithstanding that [redacted] is subject only to civil contempt sanctions.

***4. Remaining Outstanding Issues***

Two issues remain outstanding. First, [redacted] seeks to stay accrual of the $50,000 daily contempt fines until resolution of the pending motion for a declaration that the contempt fines are not enforceable. *See* Bank's Motion for a Stay of the Contempt Fines' Accrual Until this Court Rules on [redacted] Pending Motion for a Declaration ("[redacted] Stay Motion"), ECF No. 56.

[redacted] Stay Motion reveals [redacted] confusion about the operation of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* No matter how many briefs and motions [redacted] files proclaiming immunity from the exercise of this Court's jurisdiction, the Court's authority to impose contempt sanctions on [redacted] and thus for the sanctions to accrue, is secure. *See generally* Mem. Op. (Sept. 19, 2018), ECF No. 20; *In re Grand Jury Subpoena*, No. 18-3071, 2019 WL 125891 (D.C. Cir. Jan. 8, 2019). Nonetheless, [redacted] seeks to stay accrual

of the properly entered contempt sanction because, in [redacted] view, the contempt sanction is unenforceable. Yet, as the D.C. Circuit has said, and already repeated once in this case, the power to impose contempt sanctions against a foreign sovereign and the power to enforce any monetary sanctions are distinct. *In re Grand Jury Subpoena*, 2019 WL 125891, at *7 ("We stick to that practice today, meaning the form of the district court's contempt order was proper. Whether and how that order can be enforced by execution is a question for a later day."); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) ("Hemisphere's contention that whether the court can enforce its contempt sanction is irrelevant to the availability of a contempt order is consistent with the statutory scheme."). Thus, even if [redacted] ultimately prevails on the argument that the fines are unenforceable, a question which has not yet been resolved in this matter, the fines are properly accruing. Therefore, for the same reasons articulated in the Court's last opinion denying [redacted] request for a stay of the Court's October 5, 2018 Order, *see* Mem. and Order (Jan. 10, 2019), ECF No. 48, [redacted] newest motion for a stay also is denied.

Second, the Court's September 19, 2018 Order, which accompanied a Memorandum Opinion explaining the reasons for denying [redacted] Motion to Quash, ordered the government to "submit a report advising the Court whether any portions of the accompanying Memorandum Opinion may be unsealed" no later than the earlier of [redacted] compliance with the subpoena or three months from that order. *See* Order (Sept. 19, 2018), ECF No. 19. Three months now have passed. Thus, consistent with the September 19, 2018 Order, the government must submit a report advising which portions of the Court's September 19, 2018 Memorandum Opinion may be unsealed, particularly in light of the public versions of the D.C. Circuit's judgment and opinions in this matter.

For the foregoing reasons, it is hereby

**ORDERED** that, upon consideration of [redacted] Proposed Order, ECF No. 51-1, the Government's Proposed Order, ECF No. 53-1, and [redacted] Supplemental Proposed Order, ECF No. 55-1, [redacted] counsel shall refrain from making any public statement or statement to the press [redacted] beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court; and it is further

**ORDERED** that the $50,000 daily fine ordered by the Court's October 5, 2018 Order begins accruing on January 15, 2019; and it is further

**ORDERED** that [redacted] Motion for a Stay of the Contempt Fines' Accrual Until this Court Rules on [redacted] Pending Motion for a Declaration, ECF No. 56, is **DENIED**; and it is further

**ORDERED** that, consistent with the Court's September 19, 2018 Order, ECF No. 19, the government, by Tuesday, January 22, 2019, shall submit a report advising the Court whether any portions of the September 19, 2018 Memorandum Opinion, ECF No. 20, may be unsealed.

**SO ORDERED.**

DATE: January 15, 2019

Beryl A. Howell
Chief Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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|---|---|
| *In re* GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-41 (BAH)<br>Chief Judge Beryl A. Howell<br>**Filed Under Seal** |

**MEMORANDUM AND ORDER**

This case, which began with a motion to quash a grand jury subpoena, has moved quickly from this Court, to the D.C. Circuit, and to the Supreme Court, attracting public interest along the way. *See* Mem. & Order (Jan. 15, 2019) at 2, ECF No. 57 (citing media coverage). The D.C. Circuit and the Supreme Court have provided limited public access to their respective dockets, while shielding from public view the content of what has been docketed. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir.); *In re Grand Jury Subpoena*, No. 18-948 (U.S.). In light of those courts having made their respective dockets public to some extent, as well as media inquiries directed at this Court, the parties were asked to file a joint status report addressing whether a copy of the docket sheet in this matter may be unsealed to any extent, and, if so, to propose necessary redactions. Min. Order (Jan. 23, 2019).

Although the parties were unable to submit a joint report, each responded to the Court's order. *See* Witness's Status Report, ECF No. 66; Gov't's Status Report, ECF No. 67. The reports demonstrate that neither side objects to limited unsealing to the public of the docket, and the parties' proposed redactions mostly align. *See* Gov't's Status Report at 1 ("[T]he parties agree that the docket sheet can be partially unsealed and that the identity of the witness should

remain under seal."). One issue, however, is disputed: whether the identity of counsel—both government counsel and the witness's counsel—must be redacted.

On the one hand, the witness wants all counsel to be publicly known. Witness's Status Report at 2, 3 (arguing that "there is no basis for redacting Mr. Boone's and Mr. Kang's names from the docket," nor "for redacting the Special Counsel's lawyers' names").[1] The government, on the other hand, argues that identifying all counsel is tantamount both to "reveal[ing] a matter occurring before the grand jury," due to the Special Counsel's Office operating "pursuant to a limited investigative scope," Gov't's Status Report at 1, and to identifying the witness, *id.* at 2

[redacted]

At the moment, all three levels of the federal judiciary have been asked to consider, or are considering, some version of this issue. *See* [redacted] Mot. of Pet'r for Order Directing Clerk to File Unredacted Version of Pet'r's Suppl. Br. Supp. Petition for Cert., *In re Grand Jury Subpoena*, No. 18-948 (U.S. Jan. 29, 2019). This Court, however, already has ruled on what public statements the witness's counsel may make. [redacted] This

[1] [redacted]

Memorandum and Order is issued both in response to the government's request and to resolve the parties' dispute over what parts of the docket to unseal.

The Court ruled about what public comments Alston & Bird—the witness's counsel—may make about this case during an impromptu status conference, held at the government's request, without any advance notice of the issues to be addressed at the conference. *See* Gov't's Ltr. (Jan. 8, 2019), ECF No. 44 (requesting status conference). At the January 10, 2019 status conference, government counsel informed the Court that the Alston & Bird wanted to make a public statement in response to a media story that "identified Alston & Bird as the law firm that likely represented the subpoena recipient in this matter." Status Conf. Tr. (Jan. 10, 2019) at 4:4–6; [redacted]

At the hearing, the thrust of the government's objection to the proposed statement appeared to be about [redacted] not about barring public confirmation that Alston & Bird represented the subpoena recipient. [redacted]

[redacted]d

[redacted]

At the hearing, based on the representations that Alston & Bird already had been identified as the legal representative of the grand jury subpoena recipient in this case, and based on the D.C. Circuit opinion identifying the grand jury subpoena recipient as a foreign corporation, the Court ruled that Alston & Bird could say the following: "You are representing the [redacted] foreign corporation that's referred to in that opinion, with no more information [redacted] *Id.* at 16:2–6. In short, Alston & Bird was not authorized to confirm that this case relates to the Special Counsel's investigation or say anything about the identity of the grand jury recipient beyond the public disclosures in the D.C. Circuit's decision.

At Alston & Bird's request, the Court authorized the parties to submit proposed written orders. *Id.* at 15:21–23. The witness's initial proposal would have precluded Alston & Bird

from making any public comment other than "Alston & Bird does not [redacted]." Witness's Proposed Order, ECF No. 51-1. In contrast, the government's proposed order would have stopped Alston & Bird from making a statement to the media that the law firm "[redacted] in connection with the Special Counsel's investigation," Gov't's Proposed Order, ECF No. 53-1, and from "making materially identical statements that confirm their representation of the subpoena recipient in this matter or describe the recipient." *Id.* That proposed order was the first time the government clearly articulated a concern specific to Alston & Bird confirming its representation of the subpoena recipient. Indeed, in response to the government's proposed order, Alston & Bird submitted a supplemental proposed order asking that the Court not limit the law firm's freedom to confirm its representation of the subpoena recipient. Witness's Suppl. Proposed Order, ECF No. 55-1.

Upon consideration of the competing proposals, and consistent with the oral ruling, the Court's written Order instructed Alston & Bird not to comment on any publicly-unknown facts. *See* Mem. & Order (Jan. 15, 2019) at 5 (refusing to enter the government's proposed order because that order "would preclude [redacted] counsel from publicly commenting on a fact that, for all intents and purposes, is already known: that [redacted] counsel represents the subpoena recipient in this case"). Thus, the written Order read: "[redacted] counsel shall refrain from making any public statement or statement to the press that comments on the identity of the recipient of the grand jury subpoena in this case beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court." *Id.* at 10.

The parties dispute whether this Order permits Alston & Bird to confirm its representation of the witness. To clarify, Alston & Bird may not comment on publicly unknown information, which includes that this case pertains to the Special Counsel's investigation or the identity of the subpoena recipient. At the status conference, Alston & Bird's representation of the subpoena recipient was presented as having been publicly reported, Status Conf. Tr. (Jan. 10, 2019) at 4:4–6, 4:20–23, and thus, Alston & Bird was permitted to confirm only that fact of its representation, *id.* at 16:2–6; *see also* Mem. & Order (Jan. 15, 2019) at 5. That is the Court's Order.

Consistent with that Order, Alston & Bird already has made limited public disclosure about its representation, as the law firm recruits *amici* to support its petition for certiorari. *See* Witness's Status Report at 2.[2] Moreover, the Solicitor General has, inadvertently or not, identified to lawyers for the Reporters Committee for Freedom of Press, "which is moving to unseal certain appellate filings," that Alston & Bird represents the subpoena recipient. *Id.*

Although the Court's oral ruling was issued 20 days, and the written order 15 days, ago, the government never sought a stay of the Order permitting Alston & Bird to confirm its representation of the witness, or indicated an intention to appeal that Order. Yet, the government has resisted Alston & Bird's effort to identify itself publicly in filings to the D.C. Circuit. *See* Witness's Status Report, Ex. B (attaching Government's Opposition to Motion for Leave to File Public Response to Unseal). Only now, the government argues that "Alston & Bird's representation of the witness is not actually publicly known." Govt's Status Report at 3.

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[2] Supreme Court Rule 37(2)(a) requires that "[a]n *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari . . . may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file . . . ." Likewise, D.C. Circuit Rule 29 permits any *amici* other than the United States to "file a brief only by leave of court or if the brief states that all parties have consented to its filing."

According to the government, the press story which precipitated its request for the January 10, 2019 status conference "expressly stated that Alston & Bird's role in the case is not known." *Id.* at 4. As for the Solicitor General's action, the government urges "that the inadvertent disclosure does not affect the quantum of information that is part of the public record." Gov't's Response to Jan. 28, 2019 Min. Order, ECF No. 68.

In view of uncertainty about what is publicly known, and because the D.C. Circuit and/or Supreme Court is considering and may opine on whether Alston & Bird may identify itself as representing the subpoena recipient in this case, the Court will stay its order permitting Alston & Bird to identify itself as counsel to the subpoena recipient in this case. As to the parties' remaining dispute about whether the government's counsel's names should be disclosed, the Court agrees with the government up to a point: revealing the names of government counsel in this matter would confirm the involvement of the Special Counsel's Office and is unnecessary here.

For the foregoing reasons, it is hereby

**ORDERED** that Alston & Bird may not make any public comment that this case pertains to the Special Counsel's investigation or make any public comment that identifies the subpoena recipient, but Alston & Bird may publicly confirm that Alston & Bird represents the recipient of the grand jury subpoena at issue in this case; and it is further

**ORDERED** that this Court's order permitting Alston & Bird to publicly confirm that Alston & Bird represents the grand jury subpoena recipient in this matter is **STAYED** pending an order from either the D.C. Circuit or the Supreme Court that permits Alston & Bird to identify itself publicly as representing the subpoena recipient, or until either the D.C. Circuit or Supreme

Court makes public any court filing in which Alston & Bird is identified as representing the grand jury subpoena recipient; and it is further

**ORDERED** that a copy of the docket sheet for Grand Jury Action No. 18-41 will be released with redactions that are agreed upon by the parties and consistent with this Order.

**SO ORDERED**.

DATE: January 30, 2019

Beryl A. Howell
Chief Judge